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IN THE

Supreme Court of the United States

October Term, 1959

No. 201

FRANK DE SIMONE,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on May 29, 1959. Subsequent to the amended judgment contained in the certified transcript of record, and upon remand after decision by the Court of Appeals, a further corrected judgment was entered on June 11, 1959, a copy of which, for the Court's convenience, is hereto annexed and marked "Appendix A".

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit has not been officially reported. A copy of this opinion is hereto annexed and marked "Appendix B"; the opinion of the District Court of the United States for the Southern District of New York, denying petitioner a jury trial, has not been officially reported. A copy of this opinion is hereto annexed and marked "Appendix C".

Jurisdiction

The judgment of vacation of the United States Court of Appeals for the Second Circuit, which is sought to be reviewed herein, was made and entered on May 29, 1959. In substance, it affirms the conviction for criminal contempt but vacated the judgment for corrective purposes, as shown under Appendix A.

No motion for re-hearing was made to the United States Court of Appeals. The jurisdiction of this Court is invoked under Title 28, Section 1254(1) U. S. C.

The certified transcript of the Court of Appeals was not available until June 26, 1959, and since the Government contends that this is not a criminal case, but a *sui generis* proceeding, petitioner urges that Rule 22(2) of the Rules of this Court, relating to the time of filing, are inapplicable, but rather subdv. 3 of the Rule is applicable. Nevertheless, petitioner contends that he was convicted of a crime without all the legal and constitutional safeguards afforded him by law. Notwithstanding the Government's contention that this is a proceeding *sui generis*, and not a "case", petitioner contends that it is a criminal case within the meaning of the definition of a case laid down in *Nashville, Chattanooga and St. Louis Ry. Co.* v. *Wallace*,

288 U. S. 249; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227; *Cover* v. *Schwartz*, 133 F. 2nd 541, 544, 545, cert. den. 319 U. S. 748.

The Question Presented for Review

Petitioner was convicted in the District Court of the United States for the Southern District of New York for a criminal contempt, after trial or hearing by the Court, without a jury, and sentenced to six months' imprisonment plus a $1500.00 fine.

Petitioner made seasonable demand upon arraignment and plea of not guilty for a jury trial, pursuant to the provisions of T. 18, §§402 and 3691, U. S. C. and Rule 42(b) Federal Rules of Criminal Procedure, which demand was denied by Judge Weinfeld (R. 341-343).*

The said judgment was amended and corrected on March 11, 1959, to eliminate the fine *in toto*, and finally, upon the remand from the Court of Appeals, was further corrected by the judgment of June 11, 1959, printed as "Appendix A".

Petitioner is presently in custody under the contempt commitment.

This matter was initiated in the District Court by a Grand Jury presentment, and not by either an order to show cause under Rule 42(b) Federal Rules of Criminal Procedure, or an Information, or an Indictment under the Federal Criminal Statutes.

The questions thus presented are:

1. Was not petitioner's conviction or the alleged judgment or order of conviction or commitment a

* All references are to certified transcript of record.

legal nullity and a void act, in that there is neither an Information, nor an Indictment, nor an order to show cause, under Rule 42(b) Federal Rules of Criminal Procedure?

2. Was not petitioner found guilty and convicted and presently incarcerated under a judgment of conviction under the criminal contempt herein, as one arising as a Federal crime or offense, pursuant to §§401, 402 and 3690 of T. 18 U. S. C., separate and apart from any of the exceptive provisions of the said statutes; and denial to petitioner of his seasonably made demand for a jury trial constitutes a deprivation of his legal rights as well as his constitutional rights?

3. Was not petitioner prejudiced and deprived of a fair and impartial trial by the erroneous admission of hearsay evidence; admission of evidence preceding the date of the service of the Grand Jury subpoena; none of which bore on the question of petitioner's intent or alleged contumaciousness with respect to the obedience of the subpoena; and the Government and its prosecutor having been allowed by the Trial Court to make constant and repetitive reference to wholly irrelevant facts, fiction and issues greatly publicized in the press but not susceptible of any competent proof in this record which can only have had for its objective rousing passion and prejudice, all of which conduct tended to and did deny petitioner a fair and impartial trial?

The Statutes and Rule Involved

T. 18 U. S. Code provides:

"§401. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

T. 18 U. S. Code provides:

"§402. Contempts constituting crimes

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among

them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law."

T. 18 U. S. Code provides:

"§3691. Jury trial of criminal contempts

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any

lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

Rule 42 Federal Rules of Criminal Procedure provides:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Statement of Case

Petitioner was charged with a criminal contempt and tried therefor at the District Court for the Southern District of New York, before Richard H. Levet, J., without a jury; found guilty and convicted of criminal contempt, sentenced to six months plus a $1500.00 fine, which was later corrected to eliminate the fine, and later again amended after remand from the Court of Appeals (see Appendix A), and forthwith remanded, and is presently in custody. The conviction took place on February 10, 1959, and the six months' term will expire on August 10, 1959. The matter was initiated by the Government by a Grand Jury presentment, signed by the Foreman and Secretary of the Grand Jury, which charged, in substance:

> "That Frank De Simone, a witness duly subpoenaed to appear and testify before this Grand Jury, in the matter of the United States v. John Doe, under Section 371, Title 18, United States Code, and that the said Frank De Simone wilfully, deliberately and contumaciously obstructed the process of this Court in failing and refusing to appear before this Grand Jury to answer the proper questions in said proceeding before this Grand Jury" (R. 325).

At petitioner's arraignment, the question was immediately raised as to whether he was charged with any crime (R. 2, 3). Finally, a nominal bail of $1500.00 was fixed (R. 20), and time afforded to make motions challenging the validity of the service of the subpoena. That motion was overruled by Judge Weinfeld (R. 27-30), and petitioner was then called upon to plead. He pleaded not guilty (R. 30), and at that time made demand for a jury trial (R. 30), upon which there was extensive argument

before the Court (R. 34-48), upon which the District Court rendered its opinion denying petitioner a jury trial (R. 341-343).

At the opening of the trial proper, petitioner again renewed his demand for a jury trial, which was again denied (R. 74), and again renewed his motion to dismiss for lack of compliance with the statute as to Information or Indictment under Rule 42(b) Federal Rules of Criminal Procedure (R. 52, *et seq.*), which was again denied.

Petitioner, a California lawyer in good standing, was allegedly served on April 28, 1958 with a United States Grand Jury subpoena in Los Angeles, California, returnable at the Southern District of New York on May 7, 1958 (R. 331-336). Although petitioner does not press for review in connection with the deficiencies presented by the alleged subpoena (R. 331-336), it furnishes a setting to approach the present petition for review.

At the trial or hearing, it was developed that petitioner could not be responsive to the subpoena on its precise return date, but did voluntarily come in on May 19, 1958 (R. 2), when he appeared before both Judges Irving Kaufman (R. 22) and Edward Weinfeld (R. 2), in connection with the arraignment and preliminary motions. At that time both Judges requested reasons from the Government as to why they did not take petitioner before the Grand Jury (R. 16, 23), which petitioner was willing to do (R. 23). The Government's response was merely that it had no desire to do so and that the prosecutor was under instructions to proceed with the contempt (R. 25).

While the trial was before the Court without a jury, and petitioner recognizes the ability to judge impartially, the fact nevertheless remains that as the sole trier of the facts the Court was acting as the jury, and in this category the trier was not immune to the wiles of the prosecution.

The record, from its inception, arraignment and through the trial or hearing, is replete with references to racketeering (79, 82, 84), narcotics (95, 109), bookmaking (5), convention at Apalachian (86, 87, 88, 91), and about undesirable characters apparently well-known to the law enforcing agencies (138-139, 141, 204-209).

All this testimony was admitted over petitioner's objections.

Without unduly prolonging this petition, suffice it to say that this was undoubtedly designed by the prosecution to prejudice petitioner and arouse passion. If a jury were present, a mistrial would clearly have been granted. Indeed, the Court of Appeals suggested that that precisely would have been the case.

Circuit Judge Washington said:

> "Whatever prejudice might have existed had the case been tried before a jury did not exist here, as the trial was before a judge sitting without a jury" (R. 386).

The law is equally applicable to one trier of the facts as well as to twelve triers, and under the rationale in *Viereck* v. *United States*, 318 U. S. 245, 248, and in *United States* v. *Tomaiolo*, 249 F. 2nd 683, 696, 2nd Cir., the prejudice was clear.

Further testimony was allowed over petitioner's objection, tending to show petitioner's course of conduct in allegedly *evading* the service of the alleged subpoena long prior to the service date. It must be remembered, however, that petitioner is not charged with *evasion*. He is charged with wilful and contumacious conduct constituting criminal contempt in allegedly refusing to honor the Grand Jury subpoena on its exact return date.

The testimony thus admitted over objection, in substance, on a charge other than that set forth by the Government, deprived petitioner of a fair trial, and brought into operation matters for conviction not encompassed within the scope of the Government's charge.

In substance, petitioner was charged, and the proof adduced spelled out, if there was a doctrine in our jurisprudence, of "anticipatory contempt". However, in *United States* v. *Bryan*, 339 U. S. 323, 341, this Court said:

> "The offense of contempt of Congress with which we are presently concerned, on the other hand, matures only when the witness is called to appear before the committee to answer questions or produce documents and wilfully fails to do so. Until that moment he has committed no crime. There is, in our jurisprudence, no doctrine of 'anticipatory contempt'."

Thus, since petitioner here is charged with alleged disobedience, that could not have matured until he failed to appear, either wilfully or contumaciously, with intent to disobey on the return date, May 7, 1958. Thus, the only admissible and relevant testimony was to have shown petitioner's course of conduct between the service date and the return date. Admission over petitioner's objection of testimony prior to service of the subpoena constituted prejudicial error, depriving petitioner of a fair trial, and a failure on the Government's part to make out a case bearing in mind that in the case at bar, petitioner's guilt had to be proven beyond a reasonable doubt.

In *United States* v. *Bryan*, 339 U. S. 323, 330, this Court said:

> "Of course a witness may always change his mind. A default does not mature until the return

date of the subpoena, whatever the previous manifestations of intent to default. But when the government introduced evidence in this case that respondent had been validly served with a lawful subpoena directing her to produce records within her custody and control, and when on the day set out in the subpoena she intentionally failed to comply, it made out a prima facie case of wilful default."

Basis of Federal Jurisdiction in the Court of First Instance

Although the Grand Jury presentment does not set forth any statute, the only basis for Federal jurisdiction in the Court of first instance was that the Government claims a violation of the Federal statute, to wit, T. 18 U. S. C., §§401, 402 and 3691.

POINT I

The judgment of conviction as finally corrected is illegal and a complete nullity, in that there is neither an Information nor an Indictment found or lodged against petitioner, nor has there been due compliance with Rule 42(b) Federal Rules of Criminal Procedure. This prosecution is not in good faith; it constitutes harassment.

It was the Government's contention here that the instant matter is a criminal contempt proceeding, having its genesis under T. 18, §§401, 402 and 3691 U. S. C., and Rule 42(b) Federal Rules of Criminal Procedure.

It is to be observed that the presentment is limited by its caption as indicated in the transcript of record, and is a separate, distinct, purported action, suit or prosecution, separate, apart and distinct from any other.

Under T. 18, §1 U. S. C., all offenses against the United States are classified in subd. 1, as (1) felonies where punishable by death or imprisonment for a term exceeding one year; (2) any other offense is a misdemeanor; (3) any misdemeanor whereby the penalty does not exceed imprisonment for a period of six months or a fine of not more than $500.00 or both, is a petty offense.

These, and only these, are the recognizable crimes under T. 18, of which §§401, 402 and 3691 U. S. C, are a part, and which relate to the crime of contempt.

Rules 1 and 2 of the Federal Rules of Criminal Procedure govern the procedure in the United States Courts and before the U. S. Commissioners in all proceedings except those stated in Rule 54, and are intended to provide for just determination of every criminal proceeding. The exceptive provisions of Rule 54, Federal Rules of Criminal Procedure, have no application herein.

Rule 7(a) provides that an offense such as above defined under T. 18, §1, which is punishable by death, must be prosecuted by an Indictment. Any other offense punishable by imprisonment for a term exceeding one year, or at hard labor, must be prosecuted by an Indictment, or it may be waived and thus may be prosecuted by an Information. Any other offense which would include a criminal contempt must be prosecuted either by an Indictment or by an Information, and the latter may be filed without leave of Court.

Under subd. (9), a defendant has the right to waive an Indictment and be prosecuted by an Information, provided he has been advised as to the nature of the charge and of his rights, and further provided his waiver is presented in open Court.

Under Rule 12(a), the only pleadings in a criminal proceeding are: (1) Indictment, (2) Information, (3) Plea of

"Not Guilty", (4) Plea of "Guilty", and (5) *nolo contendere*. All other proceedings are abolished, and such pleas and demurrers, objections or defenses, shall be raised by motion to dismiss.

Petitioner concedes that contempt is not a crime within the meaning of the United States Constitution; nevertheless, the crime of contempt was erected as a statutory crime by Congress in the enactment of §402, T. 18 U. S. C.

Therefore, the motion made at the District Court, before the commencement of the trial, to quash or dismiss the document before that Court upon which the Government sought to prosecute, entitled "PRESENTMENT FOR CONTEMPT", under the provisions of Rule 12(b-2) was erroneously denied; since that motion went to jurisdiction of the Court, and failure of the alleged prosecuting paper (alleged Indictment or Information) to charge an offense, it could have been made " * * * at any time during the pendency of the proceeding ".

Tested by the foregoing, it at once becomes obvious that there was not before the Courts below, either (a) an Indictment, which requires, under Rule 6(f), a concurrence of twelve or more Grand Jurors, returnable to the Judge in open Court, or (b) the filing of an Information without leave of Court in the manners and respects provided by law.

The paper before the Court, referred to as "PRESENTMENT FOR CONTEMPT", is unknown to the Federal Rules of Criminal Procedure, and is an attempt to create beyond the purview of the rules a third class of procedure in the prosecution of an alleged crime.

In *2 Wilson's Works*, 363, it is stated:

> "A presentment is an accusation brought forward by the grand jury of their own mere motion.

> An indictment is a particular charge laid by the public prosecutor before the grand jury and by them found to be true."

Professor Orfield, in his treatise, at page 157, says:

> "The presentment, however, is made by the grand jury * * *. In making a presentment the grand jury is playing the role of a prosecutor. For that reason a presentment must be drawn up into a bill of indictment, and resubmitted to the grand jury."

See also: *Hausel and Walser*, Defending and Prosecuting Criminal Cases, Section 222.

In *U. S. v. Smyth*, 104 F. Supp. 283, Chief Judge Fee, of the District of Oregon, sitting by special assignment in California, said:

> "The word 'presentment' technically characterizes the process whereby a grand jury initiates an independent investigation and asks that a charge be drawn to cover the facts should they constitute a crime."

So far, therefore, it is patently clear that the document before the Courts below presented nothing to vest jurisdiction permitting petitioner's prosecution, since there was neither (a) an Indictment, (b) an Information—the only recognized pleadings on the prosecution's part in criminal matters.

In this respect, it was held, in the *Application of United Electric Radio and Machine Workers of America*, 111 F. Supp. 858, by Judge Weinfeld of the District Court below, in an exhaustive opinion, that a presentment is not a legal document and does not form the basis for any prosecution.

It is a condemned and odorous method of trying by publication and creating guilt by public dissemination, and not in a Court of law. The authorities relied upon in that opinion are most pertinent to support petitioner.

Judge Dawson, of the District Court below, in referring to Judge Weinfeld's opinion in the above cited case, said, in *Doe* v. *Rosenberry*, 152 F. Supp. 403, 407, affirmed 255 F. 2d 118:

> "He properly pointed out that a presentment is an accusation which those referred to therein have no power to answer, and as to which they have no power to interpose a defense."

Clearly, therefore, since there was no charge, what was the Government prosecuting, and what was the petitioner called upon to defend or answer?

In this respect, it is interesting to note the Reviser's Notes to Rule 7(a), Federal Rules of Criminal Procedure, in which they say that:

> "2. Petty offenses and misdemeanors for which no infamous punishment is prescribed may now be prosecuted by information, 18 U. S. C. A. Section 1 * * *; Duke v. U. S., 301 U. S. 492.
>
> * * * * *
>
> 4. Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts."

In *United States* v. *Schine*, 125 F. Supp. 734, Judge Knight, in ruling on a petition and order to show cause

which was issued showing the essential facts of an alleged violation of a final judgment, in a monopoly or anti-trust case, said:

> "The two types of contempt proceedings have been classified and defined as follows: A proceeding for civil contempt has as its object remedial punishment 'by way of a coercive imprisonment, or a compensatory fine, payable to the complainant. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 448 * * *; Oriel v. Russell, 278 U. S. 358, 364, 365 * * *. A proceeding for criminal contempt seeks punishment to vindicate the authority of the court. 'City of Campbell, Mo. v. Arkansas-Missouri Power Co., 8 Cir. 65 F. 2d 425, 427; In re: Nevitt, 8 Cir. 117 F. 448, 458.' We are here concerned with a criminal contempt charge. This must be brought upon notice.
>
> * * * * * *
>
> The proceedings herein are brought under the provisions of 18 USC §401 titled 'Crimes and Criminal Procedure'. This section provides that the Court shall punish by fine or imprisonment for '(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.'
>
> The proceeding to punish for criminal contempt is a criminal proceeding and respondents are entitled to the same benefits as those accused of crime. This is an information or indictment. Gompers v. United States, 233 U. S. 604, 610 * * *; Michaelson v. United States ex rel Chicago, St. P. M. & O. R. Co., 266 U. S. 42, * * *; Woodside v. United States, 4 Cir. 60 F. 2d 823; Sona v. Aluminum Castings Co., 6 Cir. 214 F. 936.

> The Petition is to be judged by the same standards as for an indictment for a criminal charge. United States v. Jones, D. C. 108 F. Supp. 266."

In the cited case an order to show cause had been issued pursuant to the provisions of Rule 42(b) Federal Rules of Criminal Procedure.

In re Manufacturers Trading Corporation, 194 F. 2d 948, 955, the Court said:

> "Contempts are of two kinds, criminal and civil. As said of such proceedings in Board of Councilman of City of Frankford v. Deposit Bank * * *, 6 Cir., 127 F. 812, 813: 'One is for the punishment of the alleged contempt, as an offense by fine and imprisonment, one or both, and in either case the expiation is to the public as for a criminal offense. The other is in the nature of a proceeding for the enforcement of some duty imposed upon the respondent, and is essentially a remedy for coercing him to do something required."

In *United States* v. *Brewster*, 154 F. Supp. 126, rev. 155 F. 2d 899, on the ground that there was no power in the Committee on Government Operations under the legislative grant to make the inquiry attempted, the District Court said that a contempt of Congress is a criminal contempt to be proceeded by Indictment or Information in the name of the United States, "and is subject to right of jury trial" (at p. 136).

In re Dolcin Corp., 247 F. 2d 535, the Court found the respondents guilty of criminal contempt for violation of the Court decree enjoining dissemination of advertising data and material in a restraining suit brought by the Federal Trade Commission (247 F. 2d 524, cert. den. 77 S.

Ct. 1285). The Court made it clear that criminal contempt was the only charge that could lie. In the rehearing petition, Judge Washington, speaking for the Court, made it perfectly clear that violation of T. 18, §401(3) U. S. C., of a Court process was a criminal contempt and provable only if there is proof of guilt beyond a reasonable doubt.

The difference as to the case at bar is obvious. There was no prior action or suit for violation of decree, order or judgment for which petitioner was subject to punishment. Petitioner was subjected *de novo* to an independent initial prosecution.

It necessarily follows that the motion to quash or dismiss whatever the document before the Court might have been, and concededly called by the Government "PRESENTMENT FOR CONTEMPT", which is a legal nullity, should have been granted and petitioner discharged.

It must also be remembered that the presentment for contempt merely is a request on the Grand Jury's part that something be done in accordance with recognized Federal procedure under the Federal Rules of Criminal Procedure and the Federal Criminal Statutes, viz, T. 18, that the person accused may be lawfully, properly and legally charged in accordance with law.

Any Government argument of waiver under Rule 12(b)(2) Federal Rules of Criminal Procedure, is without merit, as waiver is the relinquishment of an existent known fact or right; and since there was neither an Indictment nor an Information, there could be no waiver. The document before the Courts below was a legal nullity, and the objections referred to in the Rule are inapplicable to such an unknown document.

It finally follows, therefore, that the judgment of conviction is a legal nullity, since it was not properly founded

upon either an Information or an Indictment, nor was there before the Court the required procedure of either an oral direction or an order to show cause, as is the alternative under Rule 42(b) Federal Rules of Criminal Procedure. The judgment is, therefore, error in law.

It is perfectly clear that petitioner has not been adjudicated guilty of a civil contempt, and that his imprisonment and fine are by way of coercion as remedial punishment requiring to perform an act; because were it so, then petitioner would "carry the keys to the prison in his pocket by purging himself". This is not the rule in criminal contempt.

Although both Judges Kaufman and Weinfeld suggested to the Government that it take petitioner before the Grand Jury, the Government declined. If the Government's position and theory here is that this is a crime and a "criminal contempt", it must be in the nature of an expiation to the public for a criminal offense, and to rectify the hurt to the dignity of the Court. In this respect, the Grand Jury was in session at the time when petitioner came into the Court, a period of ten to twelve days after the return date. Notwithstanding the suggestion made by Judges Weinfeld and Kaufman, the Government declined and urged the instant matter.

In what manners and respects, other than a relatively short late period, did petitioner commit any public offense impinging the dignity of the Court or disobedience to the subpoena? The presentment alleges, as one of the necessary elements, that petitioner

> "*contumaciously* obstructed the process of this Court in failing and refusing to appear before this Grand Jury to answer the proper questions in this proceeding before this Grand Jury" (R. 325). (Emphasis supplied.)

There could be no contumaciousness or obstruction by petitioner because as soon as he came into the Court he was ready, willing and able to appear before the Grand Jury, and indeed, both Judges Weinfeld and Kaufman made the suggestion to the Government, which was declined.

Contumacious conduct has been defined as "obstinately resisting authority" (Webster's New World Dictionary Encyclopedic Edition). The record here belies this (R. 16, 23, 24, 25).

Thus, it follows that one of the prime requisites under the presentment itself here, as well as a requirement of law, is absent.

In the final analysis, if the Government in good faith subpoenaed petitioner for his testimony before the Grand Jury, that objective was destroyed by the Government itself when it refused to take petitioner, when he appeared and stated his willingness to go before the Grand Jury. This course of conduct makes it patently clear that the Government was never interested in taking petitioner before the Grand Jury, but that it had an ulterior motive, to use the weapon of criminal contempt coercively as a means of cruel and inhuman punishment for whatever purposes then suited the investigating body or agency. The Court of Appeals in its opinion says:

> "We find it difficult to understand the attitude taken by the Government in this case. * * * But such a choice may sometimes amount to mere harassment of the contemnor, rather than a real effort to aid the Grand Jury in its search for the truth" (R. 390).

Lastly, the analogy between the appearance of a subpoenaed person before a Congressional Committee who

disobeys, and the Congressional Committee then certifies disobedience to the United States Attorney, who then seeks an Indictment or Information to punish for contempt, is no different from the procedure before the Grand Jury. The disobedience to the Grand Jury subpoena is certified by way of the presentment, which puts into operation a *modus vivendi* by causing the United States Attorney to procure either an Indictment or an Information.

In the case at bar, the certification or presentment, as that term is now used interchangeably here, has been used in place and stead of the Indictment or Information which is the command of the Congressional enactment under T. 18 U. S. C. and the Federal Rules of Criminal Procedure. There is no authority therefor.

Any reliance by the Government upon *United States* v. *Goldfarb,* 167 F. 2d 737, 2 Cir., for the procedural correctness, is misplaced. In that case defendant did *not* raise, either at the Trial Court or before the United States Court of Appeals, the issue that there was no Indictment nor Information. Consequently this issue, not before those Courts, was neither argued, briefed nor decided.

POINT II

The alleged contempt herein is one arising as a federal crime pursuant to Sections 401, 402 and 3691 of Title 18, U. S. C., separate and apart from any of the exceptive provisions of the said statutes, and also constitutes a crime under the laws of the State of New York; and denial to petitioner of his seasonably made demand for a jury trial constituted a deprivation of his legal rights as well as his constitutional rights.

At petitioner's arraignment, and at the conclusion of the hearing on the motion to quash, etc., the subpoena, petitioner pleaded not guilty (R. 30), and made due demand for a jury trial. Then followed colloquy with the Court (R. 31-32), which continued over into the hearing on May 29, 1958 (R. 33 through 50), which resulted in the Court rendering its memorandum denying a jury trial (R. 341-343), upon which an order was entered (R. 350), which is brought up for review in the notice of appeal, in the United States Court of Appeals for the Second Circuit (R. 355-357).

Judge Weinfeld, in his memorandum (Appendix C hereof), referring to the relevant statutes and rule, among other things stated that under the provisions of T. 18, §§402 and 3691 U. S. C., a defendant, as petitioner here, would be entitled to a jury trial,

> "* * * if the facts constituting the contempt also constituted a crime under Federal or State law. The first inquiry is directed to this question" (R. 341-343).

The Court continued and said that the Government counsel stated he knew no crime chargeable to petitioner (R. 341-343), and that the Court's independent research failed to

disclose any substantive crime which can be bottomed upon the failure to respond to the subpoena (R. 341-343), and therefore denied petitioner a trial by jury. The Courts below completely overlooked or ignored the Congressional mandate bringing into play State law and its impact upon petitioner's rights.

The statute (T. 18, §§402 and 3691 U. S. C.) specifically provides for a jury trial if the contempt constitutes a criminal offense either under (a) any statute of the United States, or (b) under the laws of any State in which the act was committed. The presentment here charges that the act was committed in the Southern District of New York, lying within the State of New York.

Under §245, New York State Code of Criminal Procedure, power is vested in the Grand Jury to inquire into all crimes.

Under §600, New York State Penal Law, it is provided, so far as material,

> "A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor:
>
> * * * * * *
>
> 8. A person who wilfully fails to obey any mandate, process or notice, issued pursuant * * * to Chapter Two or Three of Title Four of Part Four of the Code of Criminal Procedure, * * *."

Section 601, New York State Penal Law, provides,

> "A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court."

Section 602, New York State Penal Law, provides,

> "Punishment for a contempt, as prescribed in Article 19 of the Judiciary Law, does not bar an indictment for the same offense; * * *."

Section 2, New York State Penal Law, defines "Crime" and classifies it into (a) felonies; (b) misdemeanor.

The foregoing statutes make it patently clear that disobedience to the subpoena is violative of the State law and a crime (*People ex rel. Drake* v. *Andrews*, 197 N. Y. 53), and is brought, by the language of T. 18, §§402 and 3691, U. S. C., within the orbit of the Federal statutes.

The recent determination in *People* v. *Saperstein*, 2 N. Y. 2d 210, cert. den. 353 U. S. 946, makes it perfectly clear that criminal contempt is a crime triable by jury. In that case there was a contumacious refusal to answer questions before the Grand Jury. In principle, we fail to observe any difference whether a witness does not respond on the return date to the subpoena, or whether he does respond and fails to answer questions after being directed to do so by the Court or being offered proper immunity. The rationale is equally applicable in either instance.

It necessarily follows that the Courts below were in error when they relied upon the Government's statement that it knew of no crime which could be charged to petitioner, or that its own independent research failed to disclose any crime upon which could be bottomed the alleged failure to respond to the subpoena.

That basic error lead to the erroneous conclusion that petitioner was not entitled to a jury trial. The Courts below did not discuss the exceptive provisions of T. 18, §§402 and 3691 U. S. C., and we will not discuss this point here.

Under T. 18, §401(3) U. S. C., the category of contempts is set forth, and under §402, a person so charged, as petitioner here is charged, with

> "wilfully disobeying so as to constitute a criminal offense * * * shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both."

§3691, T. 18 U. S. C., provides in the first paragraph that where the contempt charged as here, consisting of an alleged wilful disobedience and constituting the criminal offense,

> " * * * The accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases."

With the plea of not guilty here, due demand was made for the jury trial.

Any attempt by the Government to argue, either below or here, that the second paragraph of §3691, T. 18 U. S C., is inapplicable, is totally untenable because the inapplicability is patent on its face, for the exception in the statute applies only

> " * * * to a writ, process, order, rule, decree or command entered in any *suit or action* brought or prosecuted in the name of, or on behalf of, the United States." (Italics ours.)

Here there was neither writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted by the United States. The instant presentment was the initiation of the suit and there was no previous order, decree or command therein which petitioner violated.

It has been held that in a proceeding to hold one in criminal contempt, as here, there can be no summary punishment, but only the procedure prescribed by law, and the contemnor is entitled to all of the normal safeguards surrounding criminal prosecutions including a trial by jury [*De Parcq v. U. S. District Court for Southern Dist. of Iowa*, 235 F. (2d) 692].

In *Ballantyne v. United States*, 237 F. (2d) 657, in a detailed dissertation in the concurring opinion of Judge Cameron, the rule of jury trials in a criminal contempt proceeding as the instant one is declared to be absolute, and a reading of that opinion dissipates doubt, if any there could possibly be.

The observation made in *United States v. Brewster* by the District Court (154 F. Supp. 126) [reversal in 155 F. 2nd 899 has no relevancy to this point], is most pertinent when the Court said, that in a criminal contempt to be proceeded by either Indictment or Information in the name of the United States, it "* * * is subject to right of jury trial" (p. 136).

At the opening of the trial before Judge Levet, petitioner, to preserve his rights renewed his motion for a trial by jury, which motion and application were denied (R. 74, 267).

The Government's reliance on *Green v. United States*, 356 U. S. 165, is not determinative, as that case merely decides that there is no constitutional right to a trial by jury on a criminal contempt. It is to be observed that petitioner here at no time urged his right to a jury trial as a constitutional right. He urged it as a statutory right under the Acts of Congress, viz., T. 18, §§402 and 3691, U. S. C. and Rule 42(b), Federal Rules of Criminal Procedure.

Furthermore, the *Green* case arose out of a previous criminal case, and was not a separate and distinct proceeding for the first time being presented. It was ancillary to the main prosecution of Green, and the exceptive provisions appear to apply. Thus it is distinguished from the instant matter, which is an original proceeding for the first time presented under any aspect and category as a contempt constituting a crime as entitled under T. 18, §402 U. S. C.

If Judge Weinfeld at the District Court was correct in denying petitioner's demand for trial by jury, because only where the contempt constitutes a crime, is the contemnor permitted a jury trial, then what did Congress have in mind in erecting T. 18, §402 U. S. C. and §3691? The accepted canon of statutory construction commands that a statute shall receive a reasonable construction, not a forced, unnatural or ridiculous construction, or one that will lead to the unreasonable result against the legislative wording or intent, or one that shall make the statute ineffective or meaningless.

Surely, Congress had a purpose in mind when it separately set up §402 of T. 18 U. S. C., and granted a statutory right to a jury trial under T. 18, §3691 U. S. C., and Rule 42(b), Federal Rules of Criminal Procedure. The last paragraph of §402, T. 18 U. S. C., constituting the exceptive provision, was intended by Congress to make the statute inapplicable to contempts to enforce furtherance of decrees or judicial process in suits or actions prosecuted in the name of the Government. The case at bar, however, was never before the Courts except as to the instant matter, and as such this *de novo* matter is the crime of contempt contemplated by §402, T. 18 U. S. C., and is the very matter that Congress intended to afford an alleged contemnor the right to a statutory jury trial, under both §402 and §3691 of T. 18 U. S. C.

Since the District Court itself as well as the Government's prosecutor are unable to point to any statute where the disobedience of the Grand Jury subpoena, *per se*, constitutes a crime other than the plain reading of §402, T. 18 U. S. C., we are faced with the impass that unless §402 literally means what it says, it is a meaningless Congressional fiat. Moreover, the cases are replete with naked statements that contempt cases for certain purposes may be considered criminal cases, but that proceedings in contempt, whether civil or criminal, may be said to be *sui generis*. The distinction is not in form but in substance. If there is no statute which makes contempt a crime, then the statements in the cases to that effect are totally without foundation, and the Congressional mandate under §402, T. 18 U. S. C., is an absurdity, because the only contempt then triable by jury would be one which was connected with another Federal crime. For example, an assault upon a Federal officer in the process of serving a subpoena would constitute an assault as well as perhaps a contempt; and both would be so inextricable from each other that the question of a jury trial would become academic on the issue of contempt.

All of the decided authorities relied upon by the Government to establish that criminal contempt is *sui generis* long antedate the enactment of the statute, and certainly Congress was well aware of that fact. We think that Congress, recognizing the fact that the Courts are vested with inherent power to enforce obedience to their mandates or orders by proceedings for contempt, is not executing the criminal laws of the land. Therefore Congress enacted §402 and §3691 T. 18 U. S. C., with the avowed purpose and intent of creating the crime of contempt triable by jury if seasonably demanded, as petitioner did, separate and distinct from the ancient power of the Courts to punish for contempt, whether civil or criminal. The question of a jury trial is dependent upon the manner in

which the crime or offense of contempt under §402, T. 18 U. S. C., is presented. If it is the ancient power of the Court to enforce its mandate, the direction can be in any form, oral or written, so long as it is reasonable and fairly affords the contemnor an opportunity to prepare and defend himself; but if the contempt is a crime, the procedures and courses afforded must be observed. If the Court of Appeals, in its opinion, is correct in this matter, then neither §§401, 402 or 3691, T. 18 U. S. C., or Rule 42(b), Federal Rules of Criminal Procedure, have any meaning, as the substance of the determination is, regardless of what Congress has mandated, that a contemnor be prepared to appear at a time and place, to defend himself. In a civil contempt, the imprisonment and fine are by way of coercion, and are remedial punishment requiring performance of an act, and the contemnor "carries the keys to the prison in his pocket by purging himself". The rule in criminal contempt is opposite. The punishment there is for the expiation to the public for a criminal offense and to rectify the hurt to the dignity of the Court.

Finally, that petitioner was convicted of contempt as a crime, is clear from the record, because when the Court of Appeals first remanded the judgment for correction on March 11, 1959, petitioner objected to the District Court changing the original disposition, but the Court overlooked the objection, and on the Government's motion entered a corrected original sentence and judgment under which it re-sentenced petitioner to six months' imprisonment but eliminated any fine (R. 379), upon the Government's representation that it was proceeding against petitioner under the provisions of T. 18, §401 *et seq.* U. S. C., as to punishment only, which statute permits the imposition of a fine or imprisonment, not both (R. 318).

At the original sentence, at the conclusion of the trial on February 10, 1959, in response to the Trial Court as to

what punishment should be imposed and the extent of the Court's power, the Government stated there was no limitation other than the exercise of reasonable discretion (R. 318). The Court, however, did not accept this, which was apparently designed under T. 18, §401(3) U. S. C., but rather proceeded to punish petitioner under T. 18, §§402 *et seq.* U. S. C., because there the Court is vested with limited authority to impose punishment and sentence as to either (1) fine, (2) imprisonment, or (3) or both, and immediately remanded petitioner to commence serving his term, where he is presently concluding it.

On the alleged correction of sentence on March 11, 1959, the Government, with the aid of the Trial Court, shifted its position so as to mete out punishment under §401, rather than §402, T. 18, U. S. C. The Court of Appeals said, in its opinion, that no prejudice flows to petitioner (R. 388). It has, however, overlooked the fact that in so shifting the sentence, it was also shifting the contempt from the original position of a crime under §402, T. 18 U. S. C., to the criminal contempt proceeding, which is *sui generis* under §401. This was accomplished by the procedural artifice of re-sentence. The vice lies in the fact that under §401, there would perhaps be no right to a trial by jury, whereas, under §402, constituting the crime of contempt, there is a right to a trial by jury, if seasonably demanded, as petitioner did.

Even the alleged corrected judgment after remand (Appendix A) does not correctly set forth the alleged contempt. It read that petitioner " * * * wilfully, deliberately and contumaciously obstructing the process of this court in failing and refusing to appear before the Grand Jury * * * ". The record shows petitioner offered to go before the Grand Jury (R. 2, 16, 23) which the Government refused (R. 25), a position the Court of Appeals found difficult to understand (R. 390).

Furthermore, such an alleged contempt is not the real offense as the Court of Appeals make clear (R. 391). The real offense was being late 12 days. For this a member of the California bar, in good standing, is subjected to the disgraceful indignity of six months imprisonment. *Per se*, this constitutes harassment and cruel and unusual punishment (Amend. VIII, U. S. Const.).

Finally the trial court, after remand by the Court of Appeals, which implicitly suggested modification (R. 391), rejected the suggestion and re-imposed the original corrected sentence. Much more bias, prejudice and partiality would hardly be imagined.

Of course, denial of the statutory rights is only an invasion of petitioner's legal rights and deprivation of his constitutional rights, in the denial of the equal protection of the law.

It necessarily follows that denial of a jury trial to petitioner was erroneous and the deprivation of so basic a right requires review and reversal of the judgment.

POINT III

The admission of hearsay evidence and evidence preceding the date of the service of the Grand Jury subpoena was legal error, and absent such information there was no evidence beyond a reasonable doubt of petitioner's guilt, and the Government's reference to such wholly irrelevant facts had for its sole objective a coloration to arouse passion and prejudice, all of which denied petitioner a fair and impartial trial.

One charged with criminal contempt is presumed innocent until he is proven guilty (*Gompers* v. *Buck's Stove and Range Co.*, 221 U. S. 418), and there is no burden on

the contemnor to exonerate himself; the burden rests upon the prosecution to establish guilt beyond a reasonable doubt (*Western Fruit Growers* v. *Gotfried*, 136 F. 2d 58; *U. S.* v. *International Union, etc.*, 89 F. Supp. 179). An accused has no burden to prove anything, being presumed to be innocent, and is entitled to an acquittal if the evidence as a whole is inconclusive to prove guilt beyond a reasonable doubt (*U. S.* v. *Burnett*, 152 F. 2d 342, rev. oth. gr. 328 U. S., 633). Every essential element of the crime charged must be proven by the prosecution beyond a reasonable doubt (*Colt* v. *U. S.*, 158 F. 2d 641).

The Trial Court having before it the sole charge that petitioner wilfully and contumaciously failed to obey the subpoena by failing to appear on the return date, permitted evidence, over petitioner's objection, which tended to establish not that charge but a charge of evasion of service of the subpoena.

The testimony of the witness Kaufman that a Grand Jury subpoena was prepared but not served upon petitioner, admitted over continuous objection (R. 79-97), is prejudicial and erroneous. The testimony of the witnesses Freeman (R. 98-114), Uhland (R. 137-164), Jones (R. 194-210) and Shaw (R. 211-224; 233-249), being various Government and municipal employees, to the effect that they were "hunting" petitioner from November, 1957 to April, 1958, for the purposes of serving the subpoena upon him, is totally irrelevant, incompetent and immaterial, and its admission over objection was prejudicial. Likewise, the admission of the testimony of Dr. Perzia (115-136) was error.

All of this testimony was without connection to or knowledge of petitioner, and constituted the Government's unilateral attempts to attribute a corrupt intent to petitioner. Government's Exhibit 1, a previous unserved subpoena, marked for identification (R. 81), was admitted

over objection (R. 94), notwithstanding the concession that no knowledge thereof was ever brought to petitioner's notice (R. 101-102).

The introduction of all of this testimony was designed to infect the Trial Court with the virus of prejudice, not to prove but only to infer petitioner's guilty knowledge, and that not of failure to appear but rather alleged evasion of service. The Trial Court accepted all of this prejudicial testimony of evasion of service as bearing upon and making the guilty knowledge or intent of petitioner to make a wilful and contumacious default even before the service of the subpoena. This offends the principle enunciated by this Court in *U. S. v. Bryan*, 339 U. S. 323, p. 341, of the doctrine of "anticipatory contempt". This Court held, in the *Bryan* case, that there is no such doctrine, and that there is no manifestation of intention to default until the return date of the subpoena. We read that determination to mean that the only permissible evidence, short of the contemnor stating, writing or committing an overt act admitting of no other conclusion except intent to default than that which occurred between the date of service of the process and its return date, as bearing upon guilty knowledge and contumaciousness. In addition to these errors, from the time of petitioner's first appearance on his voluntary surrender, through the conclusion of the trial, the record is replete with references to racketeering (R. 79, 82, 84), narcotics (R. 95, 409), bookmaking (R. 5), convention at Apalachian (R. 86, 87, 88, 91), and other undesirable characters well known to law enforcement agencies (R. 138, 139, 141, 204-209) all totally irrelevant herein. All this was admitted over petitioner's objections, and without unnecessary detailing, it suffices to demonstrate the prejudice created and the passions aroused. Had a jury been present, to which petitioner was entitled, the motion for a mistrial would have to have been granted, even under the decision of the

Court of Appeals herein (R. 386) as well as under the principles enunciated by this Court in *Viereck* v. *United States*, 318 U. S. 245, 248; *United States* v. *Tomaiolo*, 249 F. 2d 683, 696.

As the Court of Appeals pointed out in its decision, as well as the two District Court Judges before whom petitioner had appeared prior to the trial, the Government's prime objective should have been to produce petitioner's testimony before the Grand Jury; nevertheless, it failed and refused to accept petitioner's offer to go before the Grand Jury, and the Trial Judge again refused, when the offer was renewed at the conclusion of the trial but before the sentence was imposed.

As the Court of Appeals itself herein points out, in its opinion, the Government's attitude is difficult to understand (R. 390).

From a reading of this record, the Government's choice was a clear overt act of its thinking that petitioner was not really sought before the Grand Jury, because at no time did the Government make any representation or suggest as to what testimony petitioner could give, much less that it was of any importance to its investigation (R. 390). It follows, therefore, that this was an undue and designed harassment of the contemnor to enmesh him and entrap him in legal devices which would by indirection accomplish a result that patently the Government could not accomplish by direction, that is, to indict and convict petitioner for any stated crime he allegedly committed. Such a course of conduct does not commend itself to the spirit of fair play or to the equal administration of justice, and should not be countenanced or approved, or earn the approbation of this Court.

CONCLUSION

The petition for certiorari should be granted, and this Court, in the exercise of its powers, should order the judgment of conviction herein reversed.

Respectfully submitted,

EMANUEL THEBNER,
ABRAHAM S. ROBINSON,
Counsel for Petitioner,
51 Chambers Street,
New York 7, N. Y.

APPENDIX A

Corrected

Judgment and Commitment (Rev. 7-52)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. CR 156-5.

—o—

UNITED STATES OF AMERICA

v.

FRANK DE SIMONE

—o—

On this 11th day of June, 1959, came the attorney for the government and the defendant appeared in person and having been produced in court on writ of habeas corpus, and by counsel; and this action having been remanded from the U. S. Court of Appeals for correction of judgment imposed on February 10, 1959, as previously corrected on March 11, 1959; Now upon consideration,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding of guilty by the Court of the offense of wilfully, deliberately and contumaciously obstructing the process of this court in failing and refusing to appear before Grand Jury as commended by subpoena.

as charged in presentment for contempt and the court having asked the defendant

whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months, to date from February 10, 1959.

IT IS ORDERED that the Clerk deliver a certified copy of this corrected judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

RICHARD H. LEVET,
United States District Judge.

HERBERT A. CHARLSON,
Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 286—October Term, 1958.

(Argued March 13, 1959 Decided May 29, 1959.)

Docket No. 25539

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK DE SIMONE,

Appellant.

Before:

WASHINGTON,* WATERMAN and MOORE,

Circuit Judges.

Plaintiff appeals from a judgment of criminal contempt entered in the United States District Court for the Southern District of New York, Levet, *J.* Vacated and re-

* Sitting by designation pursuant to 28 U. S. C. §294(a).

manded with instructions to enter judgment which fairly recites the contempt.

ABRAHAM S. ROBINSON, of Robinson, Thebner & McLaughlin, New York City (Emanuel Thebner and Martin J. McLaughlin, of Robinson, Thebner & McLaughlin, New York City, on the brief), *for appellant.*

WILLIAM S. LYNCH, Special Assistant United States Attorney, S. D. N. Y., New York City (Arthur H. Christy, United States Attorney, and George I. Gordon, Kevin Thomas Duffy, and Otis Pratt Pearsall, Assistant United States Attorneys, New York City, on the brief), *for appellee.*

WASHINGTON, *Circuit Judge*:

This is an appeal from a judgment of criminal contempt entered after a trial pursuant to FED. R. CRIM. P. 42(b),[1]

---

1 "RULE 42. CRIMINAL CONTEMPT

* * * * * *

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

in the United States District Court for the Southern District of New York.

On April 28, 1958, the appellant De Simone, while resident in Los Angeles, California, was served with a Federal Grand Jury subpoena, requiring him to appear on May 7, 1958, to testify before a Grand Jury sitting in the Southern District of New York. Prior to the return date, appellant's lawyer attempted several times to obtain a temporary adjournment, but without success. On the return date, De Simone failed to appear before the Grand Jury. That body thereupon issued a presentment for criminal contempt charging that De Simone "wilfully, deliberately and contumaciously obstructed the process of this Court in failing and refusing to appear before this Grand Jury to answer the proper questions in said proceeding before this Grand Jury." A writ was issued for the appellant's arrest. On May 19, 1958, De Simone voluntarily appeared in New York and surrendered. At the trial the appellant made no attempt to explain his failure to appear on the return date, or his whereabouts between April 28th and his ultimate surrender on May 19th. The appellant was found guilty of contempt and sentenced in the manner described in Part V of this opinion. His appeal followed.

I.

Appellant's first contention is that the contempt proceedings should have been initiated by an indictment or information pursuant to FED. R. CRIM. P. 7(a), as in all Federal criminal prosecutions, instead of by a Grand Jury presentment for contempt. But criminal contempts are not considered crimes in the constitutional sense, being governed by FED. R. CRIM. P. 42. *Green* v. *United States*, 356 U. S. 165, 187 n. 20 (1958). Rule 42 does not call for

an indictment or information. Under Rule 42(a), summary punishment is allowed for contempt within the actual presence of the court. Other criminal contempts—such as that involved here—are prosecuted upon notice under Rule 42(b). The latter Rule requires that the notice shall "state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such." The Rule further requires that the notice be either oral if given by a judge in open court in the presence of the defendant, or by an order to show cause or an order of arrest if made on application of the United States Attorney or an attorney appointed by the court for that purpose. It is true that there is no specific provision in Rule 42(b) for notice by Grand Jury presentment. But we think appellant received ample actual notice from the presentment and the court proceedings which followed. The presentment stated the essential facts constituting the contempt, and the trial judge set the time and place for hearing with adequate opportunity for the defendant to prepare his defense. There being no prejudice to the defendant, see *United States* v. *United Mine Workers*, 330 U. S. 258, 298 (1947), the requirements of Rule 42(b) were adequately met, see *United States* v. *Goldfarb*, 167 F. 2d 735 (2d Cir. 1948); *Carlson* v. *United States*, 209 F. 2d 209, 218 (1st Cir. 1954).

II.

As the second point of error, the appellant urges that he was improperly deprived of a trial by jury. There is, of course, no constitutional right to a trial by jury in criminal contempt cases. See, e.g., *Green* v. *United States*, 356 U. S. at 183, 186; *In Re Debs*, 158 U. S. 564, 594-95, 596 (1895). Nor in the present case was there a statutory right to a jury trial. Rule 42(b) allows "a trial by jury in any

case in which an act of Congress so provides," and 18 U. S. C. §3691 (1952) entitles a defendant to a jury trial if "the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted."[2] See also 18 U. S. C. §402 (1952). But the fact remains that the failure to respond to a Federal Grand Jury subpoena does not independently constitute an offense under any act of Congress; nor is it a violation of any statute of New York or California to which our attention has been called. The failure to respond to a Grand Jury subpoena is therefore to be tried without a jury, as a criminal contempt under 18 U. S. C. §401(3) (1952).[3] See *Green v. United States*, 356 U. S. at 182.[4]

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2. "§3691. Jury trial of criminal contempts.

"Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

"This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

3. "§401. Power of court.

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as——

* * * * * * *

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

4. As stated in 18 U. S. C. §204 (1952): "[A]ll other cases of contempt not specifically embraced in this section shall be punished in conformity to the prevailing usages at law."

III.

The appellant further urges that the subpoena itself was invalid for a variety of reasons. Several of these are frivolous on their face. The only colorable claim of error is the alleged failure of the agent who served the subpoena to tender witness and travel fees pursuant to FED. R. CRIM. P. 17(d).[5] It is true that the agent did not actually offer De Simone the fees on the spot, but he did inform him that funds were available at the Los Angeles Marshal's office—some ten minutes away from the actual place of service. The agent further informed De Simone that he was prepared to escort him to the Marshal's office to obtain the fees. De Simone rejected the offer, saying that he knew where the office was and would go there himself. But he never went. Under such circumstances, the offer to make the funds available at the Marshal's office must be considered a sufficient tender of the fees, in substantial compliance with Rule 17 (d).[6] Cf. *United States* v. *United Mine Workers*, 330 U. S. at 298; *Carlson* v. *United States*, 209 F. 2d at 218.[7]

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5 "RULE 17. SUBPOENA.

* * * * * *

"(d) Service. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law."

6 In *Taylor* v. *United States*, 221 F. 2d 809 (10th Cir.), cert. denied, 350 U. S. 884 (1955), although the facts were much the same as in the present case, no question was even raised as to the adequacy of the tender.

7 Under this view of the case, we need not reach the question of the effect of 28 U. S. C. §1825 (1952), which states that "Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof." According to the Revisors' Notes this section of Title 28 "supersedes * * * [Rule 17(d)] as to Federal criminal cases."

IV.

Other allegations of error relate to the evidence. The appellant objects to the admission of hearsay and supposedly prejudicial evidence. The judge, however, allowed such evidence into the record subject to its connection with the actual contempt. Whatever prejudice might have existed had the case been tried to a jury did not exist here, as the trial was before a judge sitting without a jury. Personal bias or prejudice on the part of the trial judge is not alleged.

The appellant also objects to the admission of evidence relating to his activities prior to the date of service of the Grand Jury subpoena. But such evidence was directly relevant to the question of intent, wilfulness, and contumaciousness. Cf. *Silverman* v. *United States*, 220 F. 2d 36, 39 (8th Cir. 1955).

The appellant also urges that the evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt. But surely the appellant's failure to appear on the return date was sufficient in itself to establish a *prima facie* case as to the requisite intent and wilfulness. "The burden was then upon the appellant to show that he had in good faith tried to comply." *United States* v. *Johnson*, 247 F. 2d 5, 8 (2d Cir.) cert. denied, 355 U. S. 867 (1957); see *United States* v. *Fleischman*, 339 U. S. 349, 360-63 (1950). As we have noted, De Simone made no attempt to explain his failure to appear on the return date or his whereabouts from April 28th to May 19th. Under such circumstances, the court had little choice but to find him guilty of criminal contempt. See *United States* v. *Goldfarb*, *supra*.

V.

Finally, there arise several questions as to the sentence imposed on appellant. Upon De Simone's conviction for contempt, the trial court sentenced him to serve six months imprisonment and to pay a fine of $1,500.00. Section 401 of Title 18 of the United States Code grants power to a court "to punish by fine *or* imprisonment, at its discretion. * * *" (Emphasis added.) The imposition of both imprisonment and fine was therefore illegal. See, e.g., *In re Bradley*, 318 U. S. 50 (1943); *Ex Parte Robinson*, 86 U. S. (19 Wall.) 505, 512 (1873). During the preparation of this appeal, the Government discovered the error in the sentence and made a motion in this court to remand the case to the District Court, pursuant to FED. R. CRIM. P. 35, which allows a court to "correct an illegal sentence at any time." The motion for remand was granted. The District Court resentenced appellant to a term of six months imprisonment, *nunc pro tunc*, and eliminated the $1,500.00 fine, which appellant had not in fact paid. The case thereafter came on for argument before this court, on a new notice of appeal.[8]

Appellant contends that this procedure created prejudicial error, urging that the original sentence was perfectly legal and hence was not subject to the provisions of Rule 35. Appellant's theory is that the contempt was prosecuted, not under Section 401 of the Criminal Code, but under Section 402, which allows a court to punish the contempt "by fine or imprisonment, or both." The argument hardly merits consideration. In our discussion of the right to indictment or information and jury trial, we

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8 Our order of remand recited that in the event a new notice of appeal was filed, that appeal should be conducted on the papers presently on file and such supplemental papers as the parties might be advised to file "without prejudice to the raising of any new points based on any order entered by the United States District Court on the said remand."

have already indicated that the failure of appellant to respond to a grand jury summons was a contempt punishable only under Section 401. The original sentence was clearly illegal, and was therefore subject to correction under Rule 35.[9] The lifting of the fine was in no way prejudicial to appellant.

De Simone also complains of the failure of the United States Attorney to take him before the Grand Jury, once he had surrendered himself, and of the failure of the trial court to provide him with an opportunity to purge himself of contempt. It appears that De Simone on several occasions after he had surrendered offered to go before the Grand Jury. The Government declined these offers. On two separate occasions shortly after the surrender the District Court asked the Government why it appeared no longer to have any interest in bringing De Simone before the Grand Jury to testify. In both instances, the Government replied that it wished to delay bringing De Simone before the Grand Jury because it wished first to prosecute him for contempt. Although the court expressed surprise at this attitude, it allowed the trial for contempt to proceed.[10] After the court had found De Simone guilty of

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9 Even if the contempt had been punishable under Section 402, the imposition of the $1,500.00 fine was a direct violation of that Section's mandate that "in no case shall the fine to be paid to the United States exceed * * * the sum of $1,000 * * * ." This even under Section 402, the sentence was correctable under Rule 35.

10 Transcript of Proceedings before Judge Weinfeld, in the New York District Court for the Southern District of New York, May 19, 1958, p. 16:

> "The Court: Is the grand jury in session now?
>
> "Mr. Shaw: Yes, it is, your Honor.
>
> "The Court: Why don't you take him before the grand jury now?
>
> "Mr. Shaw: Well, since there is the issue of this contempt outstanding, I do not believe we could take him before the grand jury until that issue is resolved."
>
> * * * * *

(continued on Page 48)

contempt, and had invited "comments with respect to penalties," defense counsel urged that De Simone be allowed to go before the Grand Jury and be given an opportunity to purge himself, sentence being suspended in the interim. The court made no direct response to this request, but proceeded, after allocution, to sentence the defendant.

We find it difficult to understand the attitude taken by the Government in this case. Technically, no doubt, the prosecutor can in his discretion choose to pursue the contempt, and refrain from bringing the contemnor before the Grand Jury. But such a choice may sometimes amount to mere harassment of the contemnor, rather than a real effort to aid the Grand Jury in its search for the truth. Certainly if after De Simone's surrender he had been brought before the Grand Jury to testify, as he was then willing to do, and had testified, the Government could still have prosecuted him for contempt if it so desired.[11] No

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Transcript of Proceedings before Judge Kaufman, May 22, 1958, pp. 23, 25-26:

"The Court: Why are you pressing a contempt? I mean, if he is willing to go before the grand jury, why don't you simply put over the application to punish for contempt?

* * * * *

"The Court: * * * [C]ertainly the prime objective is to get his appearance.

"Mr. Shaw: But there is a the possibility since the contempt in this case was strongly contumacious and deliberate and wilful, where a prison sentence or a fine would be imposed. This is not the ordinary case.

"The Court: That may well be, but * * * I should think you would want to get him before that grand jury as fast as possible.

"Mr. Shaw: It is still the Government's position, your Honor, after consulting with my superiors, we feel at least that we should delay putting him before the grand jury.

"The Court: All right. I will put it over until May 26th."

11. See *United States* v. *Sacher*, 182 F. 2d 416 at 430 (2d Cir. 1950), *affirmed*, 343 U. S. 1 at 11 (1952); *Wilson* v. *United States*, 65 F. 2d 621 at 623, 624 (3d Cir. 1933).

automatic bar to the prosecution for contempt would flow from the fact of having testified at a date later than the one specified in the subpoena. As to the sentence imposed, and the court's failure to allow an opportunity to purge, we recognize that the trial court possesses wide discretion in these matters. See *Brown* v. *United States*, —— U. S. ——, 27 U. S. L. WEEK 4195 (1959), affirming 247 F. 2d 332 (2d Cir. 1957), rehearing denied April 20, 1959. But it is to be noted that in *Brown* the trial judge accorded the witness "a *locus penitentiae* before finally adjudicating him in contempt * * *" 27 U. S. L. WEEK at 4198. And in that case the Government represented that the testimony desired to be elicited from the witness was "of the very greatest importance * * *." *Ibid.* No such representation was made in the instant case; at no time has the Government suggested—on this record at least—what testimony De Simone could give, much less that it was of any importance. Here, moreover, the sentence imposed was comparable in its severity to those customarily given where there has been a positive refusal to take the stand. See *Brown*, *supra*, 27 U. S. L. WEEK at 4200 n. 11 (dissenting opinion). The judgment contained no purge clause. Taking all these factors together, we think the sentence (even as revised) approached the outer limits of the court's discretion. Under the decision in *Brown*, however, we cannot say that those limits were exceeded.

The circumstances just recited lead us to view with particular concern appellant's complaint that the corrected judgment entered does not recite the true facts relating to appellant's actions. The judgment states that the contempt was "in failing and refusing to appear before the Grand Jury to answer proper questions * * *." In reality, appellant's contempt was in failing and refusing to appear before the Grand Jury on the return date entered on the subpoena. Twelve days after the return date, De Simone voluntarily surrendered himself to the authorities and offered to appear before the Grand Jury. We think that

justice and fair play require that the judgment be revised to describe with accuracy the offense committed. While we do not question that De Simone could properly be held guilty of contempt, the judgment must be vacated and the case remanded with instructions to enter a judgment which fairly recites the contempt of which the contemnor is guilty. Upon remand, the District Court is free to reconsider the sentence imposed in light of the circumstances as they may then appear. Should the circumstances warrant, the trial court in its discretion may again consider whether the sentence should be reduced or a purge clause appended.[12]

So ordered.

MOORE, *Circuit Judge* (concurring in the result):

I concur in Judge Washington's opinion including Parts I, II, III, IV and so much of Part V as deals with the corrected sentence. I also agree that for the sake of clarity the judgment should be modified to recite mere failure and refusal to appear, although I would construe the words "to answer proper questions" as a statement of purpose rather than as a charge of failure and refusal to answer proper questions.

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12 In *Brown*, the Supreme Court said:

> "If within 60 days of the termination of these proceedings the petitioner indicates his willingness to testify, the District Court will no doubt consider that fact in passing upon a motion for reduction of his sentence under Rule 35 of the Federal Rules of Criminal Procedure." 27 U. S. L. WEEK at 4195, fn. 15.

The same should hold true in the instant case. Of course, the District Court in considering any offer by the accused to purge himself should not be influenced by the possibility that he might refuse to answer particular questions on the basis of the privilege against self incrimination, or some other privilege. And if the Grand Jury before which De Simone was subpoenaed is no longer in session, it may be too late to offer to testify before that body, cf. *Yates* v. *United States*, 227 F. 2d 844, 847 (9th Cir. 1955); *Loubriel* v. *United States*, 9 F. 2d 807, 809 (2d Cir. 1926); *United States* v. *Collins*, 146 Fed. 553 (D. Ore. 1906), but any offer by the contemnor to appear before a Grand Jury actually in session should of course be considered.

However, I do not agree with the portion of the opinion which deals with the positions taken by the United States Attorney and by the sentencing court for the reasons: (1) there are no facts before us from which any conclusions can be drawn as to the motivating factors which prompted their actions; and (2) absent such facts I do not believe it should be the function of an appellate court to indicate the procedure or the strategy which an attorney (whether for the prosecution or the defense) should have adopted or the type of sentence which the trial judge should have imposed, unless their actions were beyond the limits of reasonable discretion.

Concededly, De Simone was served on April 28, 1958, he failed to appear on May 7, 1958, the grand jury then issued a presentment for criminal contempt, he appeared on May 19, 1958, and he made no attempt to explain his failure to appear or to account for his whereabouts during the interval. Such conduct would seem to be somewhat inconsistent with subsequent protestations of a desire to purge the contempt. De Simone chose to disregard the law and to appear when it suited his convenience. The investigation of crime and law enforcement would scarcely be benefitted by permitting persons subpoenaed to adopt such an attitude. If the only consequence of a flagrant disregard of the subpoena is to be an opportunity to purge the contempt at the contemnor's convenience there will be very little respect for the laws or the courts.

As to the failure of the United States Attorney to allow De Simone to present himself before a grand jury, quite apart from its being a matter of his judgment in the light of the facts as he knew them, he might well have felt that such action would be criticized as prejudicial to De Simone since a writ had been issued for his arrest.

Since the sentence was not beyond proper discretion no comment need be made. The trial judge saw De Simone, heard the testimony, and in all probability had the advantage of a probation report.

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

Cr. 156-5

UNITED STATES OF AMERICA

AGAINST

FRANK DESIMONE

EDWARD WEINFELD, *D. J.*

The defendant is charged with criminal contempt of court for wilful and contumacious refusal to appear before a Grand Jury in response to a subpoena served upon him.

The issue is whether he is entitled to a jury trial which he demanded upon his arraignment when he entered a denial of the charge. The Government opposes trial by jury.

The recently decided case of *Green* v. *United States*, 356 U. S. 165 lays at rest the contention that defendant has a constitutionally protected right to trial by jury of the criminal contempt charge. However, he urges that he is entitled to a jury trial by virtue of Rule 42 (b) of the Federal Rules of Criminal Procedure.

Rule 42 (b) provides that charges of criminal contempt other than those committed in the actual presence and hearing of the court shall be prosecuted upon due notice to the alleged contemnor, with specifications of the essential facts upon which the charge is grounded. The Rule further provides:

> "The defendant is entitled to a trial by jury in any case in which an act of Congress so provides."

Thus the essential question is whether Congress has so provided with respect to a charge of contempt based upon failure to respond to a Grand Jury Subpoena. Accordingly we turn to the relevant statutes.

18 U. S. C. §401 grants power to the federal court to punish by fine or imprisonment such contempt of its authority, and none other, as—

> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

§402 of Title 18 provides that contempts which are of "such character as to constitute also a criminal offense under any statute of the United States or under the laws of any state in which the act was committed, shall be prosecuted * * * as provided in §3691 of this title". This provision was intended to grant a jury trial in certain classes of criminal contempt.

Thus §3691 provides that a defendant upon demand shall be entitled to a trial by jury when the alleged contempt also constitutes a criminal offense under any act of Congress or under the laws of any state.

However, both §402 and 3691 contain exceptive provisions to the right to trial by jury. Each provides that it shall not apply "* * * to contempts committed in the presence of the court, or so near thereto as to obstruct

the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

Since under the above provisions (and passing the question of the exceptions for the moment) a defendant would be entitled to a jury trial if the facts constituting the contempt also constituted a crime under Federal or State law, the first inquiry is directed to this question. Upon argument Government counsel stated he knew of no crime which could be charged against the defendant based upon his alleged contumacious refusal to honor the Grand Jury subpoena. Counsel for the defendant is in accord with this view. Independent research by the court fails to disclose any substantive crime which can be bottomed upon the alleged failure to respond to the subpoena. Under the circumstance, the defendant is not entitled to a trial by jury.

This disposition makes it unnecessary to consider the defendant's further contention that the exceptive provisions of both §402 and §3691 do not apply on the ground that a Grand Jury investigation or proceeding is not a "suit or an action brought or prosecuted in the name of, or, on behalf of the United States."

Dated, June 3, 1958.

EDWARD WEINFELD,
U. S. D. J.